

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

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No. 77-2154

77-2154

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

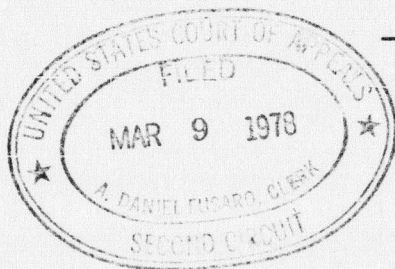
UNITED STATES OF AMERICA,
PLAINTIFF

v.

ROBERT WILLIAM GORMAN
DEFENDANT - APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNETICUT

BRIEF FOR THE APPELLANT
(IN FORMA PAUPERIS)



Robert William Gorman,
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STATEMENT OF THE ISSUES

I

WHETHER AN ERROR IN THE PRESENTENCE REPORT WAS UNLAWFULLY RELIED ON WHEN:
1) THE DISTRICT COURT SENTENCED APPELLANT ON MARCH 22, 1965, AND 2) THE
PAROLE COMMISSION DENIED APPELLANT PAROLE ON JUNE 15, 1976.

II

WHETHER THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S 2255 MOTION WAS
CLEARLY ERRONEOUS.

STATEMENT OF THE CASE

The appellant, Mr. Gorman, was tried and convicted by a jury of bank robbery in the United States District Court for the District of Connecticut in 1965, sentence was imposed on March 22, 1965. This conviction was affirmed on direct appeal, United States v. Gorman, 355 F.2d 151 (2nd Cir. 1965), cert. denied, 384 U.S. 1024 (1966). The original sentence was for a term of fifteen years on Count One and three minutes probation on Count Two. In a prior Motion to Vacate Sentence under 28 U.S.C. Sec. 2255, this sentence was modified slightly to vacate the three minutes probation leaving the fifteen year sentence standing.

Mr. Gorman had his initial parole hearing at the U. S. Penitentiary at Leavenworth, Kansas on June 15, 1976. Parole was denied at this time.

It is the appellant's contention that reliance on a false notation of a prior conviction for "mail theft and postal burglarly" in his original presentence investigation tainted the validity not only of his original sentence, but his parole consideration.

On July 25, 1977 appellant sent a Motion to Vacate Sentence under 28 U.S.C. Section 2255 raising the aforementioned grounds. On August 9, 1977 an Order To Show Cause was filed by Honorable Robert C. Zampano, District Judge For District Of Connecticut.

On August 25, 1977 the government responded to which appellant filed his traverse. Memorandum of Decision was filed November 30, 1977 and an Order filed December 1, 1977 dismissing appellant's Motion to

Vacate pursuant to 28 U.S.C. Section 2255 but granting relief to appellant by expunging the inaccurate information from appellant's presentence report. It is from this order Mr. Gorman appeals.

I

WHETHER AN ERROR IN THE PRESENTENCE REPORT WAS UNLAWFULLY RELIED ON WHEN: 1) THE DISTRICT COURT SENTENCED APPELLANT ON MARCH 22, 1965, AND 2) THE PAROLE COMMISSION DENIED APPELLANT PAROLE ON JUNE 15, 1976.

The District Court admits the presentence report was incorrect, but then goes on to say, "with assurance that even if the questioned conviction had been omitted from the presentence report or its invalidity brought to the Court's attention at the time of sentencing, it would not have resulted in a lighter sentence." This is easy to say, but very hard to prove as the same judge making this statement was also the judge that sentenced appellant. Appellant does not have the assurance spoken of in the Court's decision.

When a sentence is based in part upon a false record contained in the presentence report, there may well exist a violation of due process in the sentencing procedure. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948), United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 30 L.Ed.2d 592, 596 (1972).

The vindication of a defendant's right to not be sentenced on the basis of improper factors or erroneous information is a right recognized by the Court in Townsend and Tucker and should not depend upon the

the fortuity of the sentencing judge disclosing, perhaps inadvertently, the factors relied upon in the imposition of sentence. The fairness of the sentencing process is undermined by reliance upon inaccurate information, not by the sentencing judge stating that he relied upon material which proves to be inaccurate. In addition the explicit reliance requirement simply encourages judges not to disclose the factors considered in imposing sentence. While it is true that a trial judge is generally not obligated to give reasons for the imposition of a particular sentence, it is sometimes necessary, and always advisable, to do so. See, e. g., McGee v. United States, 462 F.2d 243, 247 (2d Cir. 1972); United States v. Carden, 428 F.2d 1116, 1118 (8th Cir. 1970).

"It is hoped that courts will make increasing use of their discretion to disclose so that defendants generally may be given full opportunity to rebut or explain facts in presentence reports which will be material factors in determining sentences." Notes of Advisory Committee on Rules, Fed.R.Crim.P. 32(c) (2) 18 U.S.C.A.Supp. 1970.) Appellant wasn't given chance to rebut the presentence report so it can never be known if the sentencing judge considered this conviction for sure.

In McGee v. United States, 462 F.2d 243 (1972) Judge Friendly at page 246 stated: "In Sum, absent some explicit indication to the contrary by the trial judge at the time of sentencing, it is not unreasonable to conclude that the initial sentencing decision may have been to some extent influenced by the conviction.

Moreover, a showing of explicit reliance on improper factors or erroneous information has not invariably been held a prerequisite to sentence relied under Townsend and Tucker. For example in McGee, supra,

it was not possible to determine whether the sentence imposed was affected by consideration of unlawful convictions. The Second Circuit, in an opinion by Judge Friendly, concluded that it was not necessary to show explicit reliance to obtain relief. It was sufficient to show that it was not improbable the trial judge was influenced by improper factors in imposing sentence. United States v. Harris, 558 F.2d at 374-375 (1977) Certainly in this case it was not improbable.

In Townsend v. Burke, supra, the Court deemed unconstitutional a sentencing proceeding in which a "prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue." See also United States v. Malcolm, 432 F.2d 809, 815-816 (2nd Cir. 1970) Similarly, the Court has only recently affirmed an appellate order vacating a sentence "founded at least in part upon misinformation of constitutional magnitude - specifically, two prior convictions unconstitutional in light of Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). United States v. Tucker, supra, implicit in these decisions is the proposition that a trial judge, in exercising his sentencing discretion, may not rely significantly upon false evidence of prior convictions or upon evidence of prior convictions which were illegally obtained.

Since the judge in this case did not say at time of sentencing whether or not he was taking the erroneous information into consideration it should not be up to him to say at a later date he was or was not influenced by the incorrect conviction. Sentence should be vacated and

appellant allowed to plead anew.

In summing up appellant's argument; trial court used a false record in sentencing, trial court admits this in its memorandum decision, and even grants relief in part. The proper procedure should have been a vacation of sentence or re-sentencing hearing by a different judge. For this and the aforementioned reasons, appellant feels this case should be remanded and prays this Honorable Court will grant same.

II

WHETHER THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S 2255 MOTION WAS CLEARLY ERRONEOUS.

The District Court granted relief in part by ordering false information expunged from presentence report. This is like closing the barn door after the cows have gone. The damage has already been done, and the government and the district court admit to the inclusion of a false conviction in the presentence report. At the very minimum, trial court should have vacated sentence and allowed appellant to plead anew, or should have re-sentenced appellant by a different judge where there would be no question as to whether or not the sentence would have been the same with or without the conviction. Citing the aforementioned cases, appellant would contend that dismissal or denial of 2255 Motion was erroneous and should have had an evidentiary hearing and oral argument before being dismissed.

CONCLUSION

FOR the foregoing reasons your appellant respectfully prays

that the Judgement of the Court below be reversed, that case be vacated and reversed, that appellant be resentenced by a different judge, and that this Honorable Court grant such other and further relief as may be just and proper, in the best interest of justice.

Respectfully Submitted,

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C E R T I F I C A T I O N

This is to certify that a copy of the within and foregoing Brief For Appelland was mailed this ____ day of January, 1978 to:
Clerk United States Court Of Appeals, United States Court House, Foley Square, New York, N. Y. 10007, and to United States Attorney, 270 Orange Street, New Haven, Conneticut 06510.

Robert William Gorman
Robert William Gorman
Appellant pro se

Subscribed and Sworn to before me, this 24th day of January 1978.

Beard D/b/t
Notary Public

MY COMMISSION EXPIRES: AUG. 05 1980